

**FILED**

**FEB 16 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDUARDO MENJIVAR-GARCIA,

Defendant - Appellant.

No. 05-50680

D.C. No. CR-04-02933-DMS

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Southern District of California  
Dana M. Sabraw, District Judge, Presiding

Submitted February 13, 2006<sup>\*\*</sup>

Before: FERNANDEZ, RYMER, and BYBEE, Circuit Judges.

Eduardo Menjivar-Garcia appeals the sentence imposed following his guilty plea to being a deported alien found in the United States in violation of 8 U.S.C. § 1326. Menjivar-Garcia contends that the district court erred by increasing his

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

sentence above 8 U.S.C. § 1326(a)'s two-year maximum based on a prior aggravated felony conviction that Menjiva-Garcia did not admit during his plea colloquy. This contention is foreclosed. *United States v. Delaney*, 427 F.3d 1224, 1226 (9th Cir. 2005) ("The Supreme Court has made clear that the fact of a prior conviction need not be proved to a jury beyond a reasonable doubt or admitted by the defendant to satisfy the Sixth Amendment . . . even when such a finding results in an increase in the penalty beyond what would otherwise be the maximum prescribed sentence.").

**AFFIRMED.**